

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN JOHNSON,

Defendant-Appellant.

UNPUBLISHED

June 27, 2006

No. 260314

Oakland Circuit Court

LC Nos. 2004-197179-FC

2004-197231-FC

2004-198312-FC

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of armed robbery, MCL 750.529, and was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 25 to 50 years each. He appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the identification evidence presented at trial was insufficient to establish his identity as the perpetrator of the charged offenses. However, the credibility of identification testimony is a question for the trier of fact to decide. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988); *People v Davis*, 241 Mich App 697, 699-700; 617 NW2d 381 (2000). In the present case, the witnesses had ample opportunity to observe the perpetrator as he robbed them. Each unequivocally identified defendant in a photographic lineup and did not waver in their identification of him at trial. The evidence was sufficient to establish defendant's identity as the perpetrator beyond a reasonable doubt.

Defendant also argues that defense counsel was ineffective for failing to request the appointment of an expert witness to testify about the weaknesses of eyewitness identification.

Because defendant did not move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review of this issue is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Initially, defendant has not overcome the presumption that counsel's decision not to present expert testimony was a matter of trial strategy. *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Defense counsel thoroughly cross-examined the eyewitnesses

concerning discrepancies and omissions in their descriptions and focused his closing argument on those points. Counsel may have determined that testimony from an expert witness, even if the court would appoint one, would not be helpful.

Moreover, defendant has not developed the record necessary to establish prejudice. See *People v Ackerman*, 257 Mich App 434, 455-456; 669 NW2d 818 (2003). Defendant refers to the weaknesses of eyewitness testimony and claims that an expert was necessary to testify about the “complex issues of perception and memory.” However, he failed to obtain an affidavit from a proposed expert discussing these issues in the context of the circumstances of this case. Instead, he asks this Court to assume that expert testimony would have been so beneficial to the defense that it would have created a reasonable probability that the result of the proceedings would have been different if the testimony had been presented. Because defendant has not established the factual predicate for his claim, he is not entitled to relief.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Patrick M. Meter